

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Dr. Xianfeng Frank Zhao

Plaintiff,

COMPLAINT

Civil Action No.

-against-

United States Department of Veterans Affairs,
Secretary Robert Wilkie

Defendant(s).
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COMPLAINT

Plaintiff Dr. Xianfeng Frank Zhao (“Plaintiff” or “Dr. Zhao”), by and through his attorneys, as and for his Complaint against the United States Department of Veterans Affairs (“Agency”), respectfully sets forth, complains, and alleges, upon information and belief, the following:

INTRODUCTION

Dr. Zhao was removed from Federal Service on November 21, 2022. On October 3, 2022, Dr. Zhao was issued a Proposed Removal with two charges: 1) Inappropriate Conduct and 2) Lack of Candor. Dr. Zhao submitted a written response on October 10, 2022 and gave an oral reply on October 11, 2022 and was allowed the opportunity to submit a supplementary written response, which was submitted on October 18, 2022. The VISN Director issued a decision letter on November 17, 2022, sustaining both charges from the Proposed removal. Dr. Zhao was removed from Federal Service on November 21, 2022.

Dr. Zhao appealed his removal to a Disciplinary Appeals Board on December 1, 2022. On April 28, 2023, the Board found:

“the discharge was based on charges that you engaged in inappropriate conduct and lack of candor. However, the Board determined evidence showed that the Agency considered new and material evidence in deciding to discharge you. As the Agency did not share this new evidence with you, the Board determined the Agency erred in denying you your basic right to due process. As a result, the Board has overturned your discharge. Additionally, the decision stated By copy hereof, within 30 days of this decision, the Director of the Desert Pacific Healthcare Network/VISN 22, Long Beach, California, will cancel the discharge from your Official Personnel Folder. The Network Director is instructed to contact you to discuss the procedures for returning you to duty.”

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 38 U.S.C. § 7462(f) as well as 5 U.S.C. §§ 701-706, 28 U.S.C. § 1331, and 28 U.S.C. § 1361.
2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2), being that the acts and transactions occurred here, Defendant’s medical center at which the events occurred is located here, and the Disciplinary Appeals Board (“DAB” or “the Board”) hearing in which the case originated was held here.
3. Plaintiff brings this action for attorneys’ fees and injunctive relief arising from the Defendant’s violations of 5 U.S.C. § 5596(b)(A)(ii) and 38 U.S.C. § 7462.

PARTIES

1. Defendant (“Agency”) operates a medical center in the State of Arizona, the Phoenix VA Health Care System (“VA”), providing medical care to veterans of the United States Military and located at 650 East Indian School Road, Phoenix, Arizona 85012-1892.
2. Dr. Zhao is a resident of the State of Arizona, County of Maricopa, residing at 16403 North 2nd Avenue, Phoenix, Arizona 85023.

FACTUAL ALLEGATIONS

3. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein with the same force and effect as if the same were set forth at length herein.
4. Dr. Zhao has practiced pathology throughout his career and at the VA.
5. During that time Dr. Zhao has had no malpractice claims or successful torts filed against him.
6. Dr. Zhao had been in federal service for years.
7. Prior to the events described herein Dr. Zhao has no history of disciplinary action.
8. On October 3, 2022, Dr. Zhao was issued a Proposed Removal with two charges: 1) Inappropriate Conduct and 2) Lack of Candor.
9. Dr. Zhao submitted a written response to the charges on October 10, 2022 and gave an oral reply to the charges on October 11, 2022.
10. Dr. Zhao was allowed the opportunity to submit a supplementary written response to the charges, which was submitted on October 18, 2022.

11. The VISN Director issued a decision letter on November 17, 2022, sustaining both charges from the Proposed removal.
12. Dr. Zhao was removed from Federal Service on November 21, 2022.
13. Dr. Zhao appealed the Removal action to the DAB.
14. The DAB is a statutorily established administrative appeals body specific to Department of Veterans Affairs Title 38 employees¹ that hears appeals of major adverse actions against such employees.
15. When the DAB hears an appeal three other Title 38 employees are appointed out of a pool of volunteers Title 38 employees² from across the Agency to form the DAB, hear the case, and render a decision.
16. A DAB hearing was held on March 14, 15, and 17 2023.
17. At the hearing Dr. Zhao contested Charges against him and argued inconsistencies in the Agency's evidence as well as lack of due process.
18. The DAB issued a decision on the case on April 28, 2023. ("DAB Decision").
19. In its decision the DAB concluded the agency committed errors that denied Dr. Zhao the right to due process. As a result of the due process error, the action was overturned.
20. The Secretary of the Agency is authorized by statute to review a DAB decision within 90 days of its issuance and if the Secretary finds it to be clearly contrary to the evidence or unlawful may reverse or remand it; otherwise the Secretary must either mitigate the imposed penalty or cause the decision to be executed.

¹ Title 38 employees are medical employees of the Agency like doctors and nurses.

² Typically a DAB is made up of doctors if the appellant is a doctor and nurses if the appellant is a nurse.

21. The Secretary designates the Agency's Principal Deputy Under Secretary for Health ("PDUSH") to review and execute DAB decision on his behalf.
22. Upon review of the DAB Decision by the PDUSH on the Secretary's behalf, the PDUSH caused the decision to be executed. Dr. Zhao received the Agency's letter informing him of the PDUSH's decision.

FIRST CAUSE OF ACTION

(Misapplication of the Back Pay Act)

23. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein with the same force and effect as if the same were set forth at length herein.
24. The DAB awarded Dr. Zhao back pay.
25. The PDUSH, in his execution of the DAB Decision, ordered the Agency to award back pay to Dr. Zhao.
26. Dr. Zhao timely submitted a petition for attorneys' fees under the Back Pay Act accompanied by a 75-page brief (including exhibits) on or about June 30, 2023.
27. On or about early April 12 of 2024 the Agency sent a letter to Dr. Zhao denying all attorneys' fees in the case. The Agency's letter contained no factual basis for its denial instead claiming the Dr. Zhao failed to meet his burden that he was the prevailing party and that an award of attorney fees is in the interest of justice.

WHEREFORE, Plaintiff, Dr. Zhao, demands judgment in his favor against Defendant, Acceptance Now, for attorney's fees and court costs for the DAB case and this appeal of the Agency's fee determination pursuant to 5 U.S.C. § 5596(b)(A)(ii), 38 U.S.C. § 7462, and 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment from the Defendant as follows:

- a) That Dr. Zhao be awarded attorneys' fees in the amount of \$127, 219.70 for his successful appeal to the DAB and further reasonable attorneys' fees resulting from the instant action;
- b) That Dr. Hutchinson be awarded such other and further relief to which he is justly entitled.

Dated: February 13, 2025

Respectfully Submitted,

Amanda Moreno

By: Amanda Moreno, Esq.,
The Law Offices of Eric L. Pines, PLLC
New York Bar No. 2839504
Eastern District Bar No. AM0544
10101 Fondren Rd #575
Houston, TX 77096
Phone: (832) 608-1212
Email: amanda@pinesfederal.com
Attorneys for Plaintiff

PRO HAC VICE APPLICATION
FILED